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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY 19 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
NAB and INTV Request for)
Declaratory Ruling) MM Docket No. 92-259
)
Broadcast Signal Carriage Issues)

OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION

On May 13, 1993, the National Association of Broadcasters and the Association of Independent Television Stations filed a "Request for Declaratory Ruling" in the above-captioned proceeding. While NAB and INTV acknowledge that "many cable operators are faithfully complying with the rules", they claim that "a disturbing number [of cable operators] appear to be misreading the Commission's requirements in an effort to obstruct the implementation process."^{1/} Indeed, NAB and INTV go so far as to pronounce that "many cable operators have used the signal coverage requirement to circumvent or delay implementation of the must carry obligations."^{2/} But the documentation submitted with the Request does not support this sweeping over-generalization of the cable industry's conduct.

1/ Request for Declaratory Ruling at 1 (hereinafter "Request").

2/ Id. at 2.

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Instead, it shows that operators are attempting to follow the rules that the Commission has imposed -- though, perhaps, not the rules that the broadcasters would wish to have the Commission now impose.^{3/}

Provision of a Good Quality Signal

Section 76.58(d) states only that "by May 3, 1993, a cable operator must notify all local commercial and NCE stations that they may not be eligible for carriage because they either (1) Fail to meet the standards for delivery of a good quality signal to the cable system's principal headend or (2) May cause an increased copyright liability to the cable system." While the Commission's rules do not specify the information that must be included in the May 3rd signal quality notice,^{4/} the Report and Order explains that an operator's notice to a broadcaster should, among other things, list the equipment used to make the initial measurements -- as indeed virtually all the notices attached to NAB and INTV's declaratory ruling petition do.

3/ It may be that INTV and NAB wish the FCC to reconsider certain of its rules -- and indeed, several of the "clarifications" they now raise have also been raised in their reconsideration petition. See INTV Petition for Reconsideration at 2-5.

4/ That certain operators may have been confused about the specificity of the notice requirements is understandable. Operators may have been relying on interpretations publicly expressed by Commission staff that the initial round of notices need not include any specific engineering information.

What NAB and INTV appear to object to is not the operator's failure to list the equipment used, but the use for measurement purposes of so-called "inexpensive and non-professional antennas, as opposed to the antennas that cable operators normally use to receive local television signals".^{5/} But nothing in the rules or the language of the Report and Order requires operators to use higher gain antennas or "notched" antennas specifically designed to receive a station's signal, as NAB and INTV's petition would lead one to believe.

Nor should the Commission adopt such a requirement. A system carrying a particular broadcast signal ordinarily may have an antenna cut to a particular frequency. But for purposes of making measurements to determine whether a signal has adequate strength under the rules, it would be pointless to require operators to invest in this expensive equipment only to determine that the signal is inadequate -- and that a station has no intention of delivering a good quality signal to the system. As the Commission made clear in its Report and Order, "we generally agree with cable interests that it is the television station's obligation to bear the costs associated with delivering a good quality signal to the system's principal headend. This may include improved antennas" Report and Order at para. 104 (emphasis added). Requiring operators to first purchase this

5/ Request at 2.

equipment for measurement purposes, as the broadcasters seek, puts the shoe on the wrong foot.^{6/}

Similarly, the rules impose no requirement that operators take measurements at any particular elevation. Indeed, it may well be that all of the system's antennas are located at the same height as where the measurement was made -- and there is nothing in the exhibit submitted by the broadcasters to demonstrate otherwise.^{7/} Even if a measurement may have been taken at elevations lower than the height of the system's regular receiving equipment, those measurements can be correlated with signal strength at a higher elevation. It makes no sense to require an engineer to climb a 200 foot tower to make measurements where a measurement taken at 30 feet demonstrates that it is mathematically impossible for the signal as currently

imposing a uniform requirement would only cause further confusion.

The broadcasters also complain that they have received notices from operators regarding the inadequacy of signal strength of signals already carried by the system.^{8/} The mere fact that an operator has voluntarily carried a station in the absence of must carry rules does not, however, mean that it is a must carry station under the 1992 Cable Act's definition or the Commission's rules. The Act incorporates a signal strength requirement. The fact that operators are requiring stations currently carried to deliver an adequate signal strength in order to assert must carry rights under the Act is entirely consistent with the Act and the rules -- and certainly provides no evidence of an intent to undermine the statute. NAB and INTV's preferred approach -- that operators must continue to carry these stations until a dispute is resolved -- is entirely unfair. It will only encourage prolonged disputes, and increase the likelihood that the Commission will be burdened with carriage disputes.

Finally, we do not dispute that where a local station has made improvements to its signal in order to deliver an adequate signal to the system, a system must carry that signal under the terms of the Cable Act. However, it is not feasible to require, as INTV and NAB suggest, that operators "carry the station on the

8/ Request at 3.

date the signal is provided to the cable system."^{9/} Operators may have to drop or rearrange channels in order to accommodate the new signal. They must provide notice to their subscribers and franchising authorities. All of these steps take time, and it is unrealistic to expect that they can be accomplished overnight.

Copyright Indemnification

The Report and Order required operators on May 3, 1993, to notify "those local signals that may not be entitled to carriage because they ... may cause increased copyright liability." Report and Order at para.31. NAB and INTV's protestations notwithstanding, there is no requirement that systems "inform stations of the amount of potential copyright liability"^{10/} in their initial notice. Calculating royalty payments for numerous broadcast stations not previously carried is no easy task, particularly where royalties hinge on the number of distant signals carried. These calculations would have been especially difficult to make on May 3, since the Commission's rules establishing benchmark rates for channels were only released that day. It made ample sense not to require operators to send an estimate of copyright royalty payments even before a station had

^{9/} Request at 4 (emphasis added).

^{10/} Id.

contacted the system to indicate its interest in cable carriage at all.

With respect to the broadcasters' suggested "clarifications" of copyright indemnification issues, it again bears mentioning that there does not appear to be any requirement in the rules that operators make their Statements of Account available to broadcasters. Rather, the Report and Order states that a "cable operator [should] provide the broadcaster with an estimate of the expected copyright liability based on previous payments and financial information." But even if the Commission were to impose a new requirement to provide broadcasters with a copy of their Statement of Account for the most recent accounting period along with an estimate of future liability, those forms do not include the additional information that broadcasters seek. There is no reason to believe that operators will have information readily available about the number of distant signals previously (as opposed to currently) carried by the cable operator or the order in which such distant signals were carried.

CONCLUSION

As we explained in our Request for Stay Pending Reconsideration, which is currently under consideration by the Commission, the new rules required cable operators to do an enormous amount of work within one month's time. Over 11,000 cable systems were required to analyze and send out notices to over a thousand broadcast stations. NAB and INTV's filing demonstrates that the process of adjusting to the new signal

carriage regime would be best served by giving operators and broadcasters sufficient time to fully understand their respective obligations, and to sort out any disputes over carriage. We continue to believe that this process will best be served by the Commission issuing a stay of its must carry rules pending reconsideration, as requested in NCTA's petition. In any event, the "clarifications" sought by the broadcasters generally do not "clarify" but, rather, go beyond the obligations imposed by the new rules. If the Commission is to change those obligations, it must do so through a further notice and a comment proceeding, either on reconsideration or in a new rulemaking proceeding.

For the foregoing reasons, the broadcasters' request should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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